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THE STATION NIGHTCLUB FIRE AND FEDERAL JURISDICTIONAL REACH: THE MULTIDISTRICT, MULTIPARTY, MULTIFORUM JURISDICTION ACT OF 2002

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ARTICLE

THE STATION NIGHTCLUB FIRE AND FEDERAL JURISDICTIONAL REACH: THE MULTIDISTRICT, MULTIPARTY, MULTIFORUM JURISDICTION ACT OF 2002¹

PETER ADOMEIT²

INTRODUCTION

The fourth worst nightclub fire³ in American history occurred on February 20, 2003, in West Warwick, Rhode Island at The Station nightclub during a rock concert by the California-based heavy metal band “Great White,”⁴ a few weeks after the effective date⁵ of

1. Pub. L. No. 107-273, § 11020, 116 Stat. 1758 (2002). It is part of the 21st Century Department of Justice Appropriations Authorization Act.

2. Professor of Law, Western New England College School of Law. Professor Adomeit teaches Civil Procedure and Labor Law. He is a member of the National Academy of Arbitrators. He also has served as a Special Master in discovery matters in Federal Court.

3. The others were Boston, Massachusetts, 1942—“the Coconut Grove fire”—(491 killed); Natchez, Mississippi, 1940 (198 killed); and Southgate, Kentucky, 1977 (175 killed). Elizabeth Mehren & Stephen Braun, *Rhode Island Nightclub Fire Toll Nears 100; Band's Pryotechnics Ignite a Life-or-Death Rush for the Exits*, L.A. TIMES, Feb. 22, 2003, at 1. For a history of nightclub fires in America, and how strict enforcement and building codes have reduced the yearly number of nightclub fires from 1,369 in 1980 to 510 in 1998, see *id.* The worst single-building fire in American history killed 600 at the Chicago Iroquois Theater in 1903 when the stage curtains ignited. This is the subject of a book by Tony Hatch entitled *TINDER BOX*. Sean D. Hamill, “*Tinder Box*” Author Notes Tragic Parallel to Club Deaths, CHI. TRIB., Mar. 4, 2003, at 1. The Ringling Bros. and Barnum & Bailey tent fire of 1944 in Hartford killed 168. Raja Mishra, *Hartford Group-Home Fire Kills 10, Dozens of Disabled, Aged Patients Led to Safety, 23 Hurt*, BOSTON GLOBE, Feb. 27, 2003, at B-1.

4. Dave Wedge & Jessica Heslam, *Station Pyro Passed Muster in Past*, BOSTON HERALD, Mar. 5, 2003, at 1; Michael Powell, *R.I. Inspector Never Cited Foam; Club Where 98 Died in Fire Used Flammable Soundproofing*, WASH. POST, Mar. 4, 2003, at A-2.

5. The Act, which became effective on November 2, 2002, provides: “The amendments made by subsection (b) [adding 28 U.S.C. §§ 1369, 1697, and 1785, and amend-

the Multidistrict, Multiparty, Multiforum Jurisdiction Act of 2002. As the band started its first number at 11:00 p.m. before a packed audience, estimated at 380 people, their pyrotechnics ignited foam sound insulation on the walls and ceiling.⁶ The fire spread rapidly, creating an inferno within three minutes.⁷ The lights went out, and in the panic, many could not escape.⁸ One hundred people have died,⁹ nearly one hundred ninety were injured, some twenty critically.¹⁰ A WPRI cameraman, Brian Butler¹¹ recording what he thought was going to be a concert, kept the camera rolling as he backed out of the hall, catching the fire's start, its rapid spread, and the victims' struggling to escape. The pictures were broadcast widely, and the fire was national news.¹² There is no way of overstating the impact this tragedy has had on the people of a small state like Rhode Island.¹³

A disaster's effects ripple through a community, starting at the core with the seriously injured and relatives of the deceased, and moving in concentric circles through survivors who were exposed to the disaster, to extended family members and rescue and re-

ing 28 USCS §§ 1391 and 1441] shall apply to a civil action if the accident giving rise to the cause of action occurred on or after the 90th day after the date of the enactment of this Act." P.L. 107-273, § 11020(c), 116 Stat. 1829.

6. Powell, *supra* note 4.

7. News reports say smoke filled the building within twenty to thirty seconds, and within three minutes, the whole interior was ablaze. Mehren & Braun, *supra* note 3.

8. An interview from the burn unit in a Rhode Island hospital, describes how the floor collapsed as people piled up seven and eight deep, and how a "molten, tarlike substance dripped on [a victim] from the ceiling of the burning nightclub as he struggled to escape." Mary Duenwald, *Tales From a Burn Unit: Agony, Friendship, Healing*, N.Y. TIMES, Mar. 18, 2003, at F-1 (illustrating two of the stories that a jury is likely to hear).

9. Associated Press, *Nightclub Fire Death Toll Rises to 100*, CNN.COM, May 6, 2003, at <http://www.cnn.com/2003/US/Northeast/05/06/club.fire.ap/>.

10. Dave Wedge, *R.I. Fire's Death Toll Hits 99 as Officials Plan Fines in N.J.*, BOSTON HERALD, Mar. 7, 2003, at 2, 2003 WL 3018536. As of March 18, 2003, eleven were reported to be still in critical condition, most on heavy sedation and breathing on ventilators. Duenwald, *supra* note 8.

11. Lynne Duke, *The Fire After; Two Brothers Fall into a Side Business—and Their Own Public Hell*, WASH. POST, Mar. 8, 2003, at C-1.

12. See, e.g., Michael S. Rosenwald & Jared Stearns, *Deaths, Injuries in Fire at R.I. Club*, BOSTON GLOBE, Feb. 21, 2003, at A-1; Ariel Sabar, *Two Minutes that Seemed Like Forever; Great White Fan Relives Terrifying Moments Before Escape from R.I. Inferno*, BALTIMORE SUN, Feb. 23, 2003, at 1-A; Amy Forliti, *85 Die in Club Fire*, DESERET NEWS, Feb. 21, 2003, at A-1, 2003 WL 11722280; *Fatal Fire Erupts at Nightclub Rock Show*, CHI. TRIB., Feb. 21, 2003, at 16, 2003 WL 13239939.

13. Some measure of the public response can be found in the outpouring of charitable contributions and help and assistance to the victims. *The Station Nightclub Disaster—Help, Memorial Services, Benefits*, PROVIDENCE J., Mar. 12, 2003, at A-14, 2003 WL 7058654.

covery workers, to health-care providers and school personnel, to government officials and affected businesses, to the community at large.¹⁴

The Rhode Island Judicial Department, having previous experience with multiple cases involving asbestos claims and multiple claims involving child abuse by clergy, has moved quickly to prepare for the expected litigation. The Rhode Island Judicial Department has assigned in advance all cases arising from the fire to a respected judge, The Honorable Alice Gibney,¹⁵ who previously handled several hundred asbestos cases.¹⁶ Representative Timothy Williamson of the Rhode Island Legislature introduced H. 6148,¹⁷ authorizing the Presiding Judge of the Superior Court to create special rules governing The Station fire cases.¹⁸

In response to the first cases filed March 4, 2003,¹⁹ the Rhode

14. Felice J. Freyer, *The Station Nightclub Disaster—Fire's Psychological Pain will Test Survivors and Victims' Families for Years*, PROVIDENCE J.-BULL., Mar. 19, 2003, at A-1. The article quotes Brian W. Flynn, Associate Director of the Center for the Studies of Traumatic Stress, at the Uniformed Services University of the Health Sciences in Bethesda, Md. "He said the West Warwick fire was unique because it struck the unusually close-knit Rhode Island community, so its reverberations were felt widely." Litigation does not end the pain. "Unlike a natural disaster, a human-caused event can cause people to focus on fixing blame and seeking justice. Litigation, with its slow pace and emphasis on how badly the victims' lives were damaged, often makes it hard for them to move on." Litigation may solve financial problems, but not psychological ones. "Victims often have an unrealistic notion of justice," Flynn said. "People believe lots of times that if there is successful litigation, their problems will go away." People can win their suit but "wake up the next day still having lost what they've lost," he said. *Id.*

15. Wedge, *supra* note 10. This article reports that Judge Gibney was assigned on March 5, 2003, the day after the first case was filed.

16. Jonathan Saltzman, *Purchase of Foam at Club is Traced*, BOSTON GLOBE, Mar. 6, 2003, at B-5, 2003 WL 3383716.

17. The bill, introduced March 4, 2003, reads:

Section 1. The General Assembly finds that the interest of those who suffered a loss because of death or injury as a result of the tragic fire at The Station in West Warwick, Rhode Island on February 20, 2003 can best be served by a fair, just, speedy and inexpensive resolution of their claims. Notwithstanding any provisions of the law or Superior Court Rules of Civil Procedure or Practice to the contrary, all civil actions for damages as a result of this fire shall be filed and heard pursuant to the rules and regulations promulgated by the Presiding Justice of the Superior Court. Provided, however that any rule promulgated by the Presiding Justice of Superior Court that repeals or amends any law shall require the approval of the General Assembly. Section 2. This act shall take effect upon passage.

H. 6148 (R.I. 2003) (on file with author).

18. Liz Anderson, *The Station Nightclub Disaster—Bill Would Simplify Fire Lawsuits*, PROVIDENCE J.-BULL., Mar. 12, 2003, at A-12, 2003 WL 7058667. Representative Williamson's district includes West Warwick.

19. *Roderiques v. Town of West Warwick*, No. PC 03-1084 (R.I. Super. Ct. Mar. 4,

Island Bar Association and the Rhode Island Lawyers Association issued a joint statement discouraging a rush to litigate: "The news that a local attorney has filed suits in this matter at this time is both unfortunate and disconcerting."²⁰ David Curtin, the Rhode Island Supreme Court's disciplinary attorney, issued a public warning of criminal prosecution for unauthorized practice of law to out-of-state lawyers who were allegedly offering their services to victims.²¹ Judge Gibney also issued a statement, "This is not about speed, but rather about thoroughness, fairness, efficiency and consistency in administering steadfast justice for all of the parties involved."²²

The judicial process will be working in a charged atmosphere tinged with immeasurable grief, sorrow, suffering, and anger towards those deemed responsible, huge medical expenses for some, and staggering economic damages. The claims could reportedly total hundreds of millions of dollars.²³

I. ENTER THE MULTIDISTRICT, MULTIPARTY, MULTIFORUM JURISDICTION ACT OF 2002²⁴

As the Rhode Island Judicial Department prepares to invest substantial judicial resources to resolve these cases fairly and expeditiously, this new federal act may complicate their efforts. If the Act is applied creatively, it could give helpful assistance toward resolving these cases . . . or it could cause delay.

The House Judiciary Committee Report,²⁵ dated July 30, 1999, shows the Act was in response to a 1998 decision by the United States Supreme Court holding that when federal cases were transferred to a single federal court for discovery under the Multidistrict

2003), naming fourteen defendants, was filed before the 40-day waiting period expired under R.I. GEN. LAWS § 45-15-5 (2002) for actions against municipalities. *Kingsley v. Derderian*, No. 03-1171 (R.I. Super. Ct. Mar. 10, 2003), names eighteen defendants but not the Town of West Warwick. The statute of limitations for wrongful death in Rhode Island is three years. R.I. GEN. LAWS, § 10-7-2. The statute of limitations is tolled for minor plaintiffs until the age of majority, R.I. GEN. LAWS, § 9-1-19, but not in wrongful death cases. *Short v. Flynn*, 374 A.2d 787, 790 (1977).

20. Wedge, *supra* note 10.

21. Tracy Breton, *The Station Nightclub Disaster—Unscrupulous Lawyers—Targeting Families*, PROVIDENCE J.-BULL., Mar. 6, 2003, at A-1, 2003 WL 7057906.

22. *Club Owner's Lawyer Reacts to Statements About Foam; Pine says Affidavit Backs up Derderians*, TURNT010.COM, Mar. 6, 2003, at <http://www.turnto10.com/news/2024914/detail.html>.

23. Ralph Ranalli & Christopher Rowland, *Real Estate Group Backs Sprinkler Bill*, BOSTON GLOBE, Mar. 14, 2003, at B-3, 2003 WL 3385142.

24. Pub. L. No. 107-273, 116 Stat. 1758 (2002).

25. H.R. 106-276, 106th Cong. (1999).

Rules, the receiving court could not try the cases, but had to return them for trial to the federal courts from which they were transferred.²⁶ The Act reverses this decision, allowing the court receiving Multidistrict cases to retain them for trial under certain circumstances. It also went well beyond this immediate issue.

A. *Summary of the Act*

The Act changes the laws of federal jurisdiction, removal jurisdiction, venue, service of process, and subpoenas in 28 U.S.C. §§ 1369, 1391, 1441, 1697 and 1785. I liken the Act to a vacuum cleaner: it can suck up all of the cases arising out of this horrific fire regardless of where filed²⁷ and deposit them in federal court in Rhode Island.²⁸ Once there, the federal court “shall abstain from jurisdiction” if the dispute is primarily local,²⁹ or the federal court could keep the cases for determination of liability.³⁰ If there is a finding of liability, there is a right to immediate appeal;³¹ if liability is upheld, the federal court then returns the cases “to the State court from which it had been removed”³² for a determination of damages, but is given discretion to retain the damage issues as well.³³

B. *The Act Only Requires Minimal Diversity*

The Act creates original jurisdiction in federal court for “any civil action” involving “minimal diversity”³⁴ for claims for deaths

26. *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (interpreting 28 U.S.C. § 1407(a), and holding that 28 U.S.C. § 1404(a) did not give authority to the discovery court to transfer the cases to itself, despite a history of self-assignment).

27. 28 U.S.C. §§ 1369–1441(d) (2002). Any victim of the accident can intervene, even those who could not file originally in federal court, according to § 1369(d).

28. Section 1369(e) calls for notice to the Judicial Panel on Multidistrict Litigation. Because the accident occurred in Rhode Island and many of the victims reside there, the proper court to receive the cases would appear to be the Rhode Island Federal District Court. Venue under § 1391(g) in § 1369 cases is where “any defendant resides” or where “a substantial part of the accident giving rise to the actions took place.”

29. § 1369(b).

30. § 1441(e)(2).

31. § 1441(e)(3).

32. § 1441(e)(2).

33. *Id.*

34. “[M]inimal diversity exists between adverse parties if any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign State, or a foreign State as defined in section 1603(a) of this title.” § 1369(c)(1).

and injuries and property damage “arising from a single accident”³⁵ causing at least seventy-five deaths if certain, easily met conditions are present.³⁶ Therefore, the statute applies to The Station nightclub tragedy. The fire was caused by an accident,³⁷ it resulted in more than seventy-five deaths, there are at least two adverse parties from different states: victims resided in states other than Rhode Island, and any two defendants are from different states (for example the band members of “Great White” were reportedly residents of California, while the owners of The Station reside in Rhode Island).

The concept of “minimal diversity” comes from the Federal Interpleader Act,³⁸ which requires diversity of citizenship between any two claimants, regardless of whether additional claimants are from the same state. The Supreme Court has concluded that all the Constitution requires is minimal diversity and not complete diversity.³⁹

C. *The Act Covers Claims for Wrongful Death, Injuries and Property Damage*

The statute contains a threshold of at least seventy-five deaths, but once that is reached, the statute creates jurisdiction over “any civil action . . . between adverse parties that arises from a single accident.” The term “any civil action” is all-inclusive. It is not limited to wrongful death actions. It contains an added limitation that an action for property damage may be maintained “only if [there is] physical harm” to a “natural person.”⁴⁰ These words seem confusing. Here is why.

The Act as originally proposed applied where twenty-five persons “either died or incurred injury” in the accident, and it also

35. § 1369(a).

36. § 1369(a) requires:

(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place; (2) any two defendants reside in different States regardless of whether such defendants are also residents of the same State or States; or “(3) substantial parts of the accident took place in different States.

37. The Act defines an accident as “a sudden accident, or a natural event culminating in an accident, that results in death incurred at a discrete location by at least 75 natural persons.” 28 U.S.C. § 1369(c)(4) (2002).

38. § 1335.

39. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967).

40. § 1369(c)(3).

contained a \$75,000 amount in controversy⁴¹ requirement. It was necessary, therefore, to define injury. When the statute finally passed, the number was raised to seventy-five, the reference to “or incurred injury” was dropped, and the \$75,000 amount in controversy provision was dropped. The definition of “injury” remained, however, in § 1369(c)(3). However, there was nothing to attach the definition to. This much is clear. If Congress intended by this to limit the lawsuits to wrongful death only, and not include injuries to persons or property, they expertly concealed that intent by including a definition of injuries to persons or property. Nor is there anything in the operative language that limits the Act to death cases only. Finally, the damages for injuries could well exceed those for wrongful death, and if the statute is to have any effect on mass torts, all claims must be included, not just some of them. A remedial statute should be given a construction that brings about, rather than nullifies, the intended result. The words “any civil action” mentioned above supports the argument. Thus, the Act appears to cover all cases arising out of The Station nightclub fire.

D. *The Act Contains No Minimum Amount in Controversy*

The Act contains no amount in controversy requirement. Assuming minimal diversity, any tragedy that takes seventy-five lives will be of sufficient moment to warrant the attention of the federal courts. This also means that smaller claims (for example, damage to a car in the parking lot of The Station nightclub, damage well under the \$75,000 requirement of the general diversity statute)⁴² could be filed in or removed to Federal Court under the Act.⁴³ There is not even a \$500 threshold such as exists in the Federal Interpleader Act.⁴⁴ The intent is to consolidate all claims from the accident—literally all claims—in federal court. In this way, the sweep of the vacuum cleaner is complete.

41. § 1369(a) (proposed in 1999 Committee Reports amended and enacted in H.R. 2215, 107th Cong. (2002), H.R. 106-276 (July 30, 1999)).

42. Section 1332(a) requires a claim in excess of \$75,000, exclusive of interest and costs.

43. The only limitation is contained in the definition of “injury,” which is either “(A) physical harm to a natural person and (B) physical damage to or destruction of tangible property, but only if physical harm described in subparagraph (A) exists.” 28 U.S.C. § 1369(c) (2002). The statute obviously does not require that the person injured be the same person who lost property.

44. § 1335(a).

E. *The Act Provides for Nationwide Service of Process and of Subpoenas*

The Act⁴⁵ provides for nation-wide service of process and nation-wide subpoena of witnesses.⁴⁶ In this, the Act is similar to the Federal Interpleader Act.⁴⁷ On a practical level, this means that federal courts are not dependent upon the vagaries of state long-arm statutes to determine whether federal courts have jurisdiction over the person.

F. *The Act Allows Any Person with a Claim to Intervene*

The Act provides that "any person with a claim arising from the accident . . . shall be permitted to intervene."⁴⁸ The right to intervene exists even if the person could not have brought an original action under the Act.⁴⁹ This makes clear the sweeping nature of the Act. Once federal jurisdiction attaches, all claims may be adjudicated at the same time without restrictions, so long as plaintiffs are willing to intervene and defendants are willing to remove or the first plaintiffs are willing to file in federal court.

G. *The Act Provides for Broad Removal Jurisdiction in Federal Court*

We have seen that § 1369 creates original jurisdiction in federal court involving the deaths of "at least 75 natural persons"⁵⁰ at a "discrete location" resulting from an "accident" with "minimal diversity between adverse parties." Under § 1369(d), a plaintiff has a right to intervene "even if" unable to sue under § 1369 "as an original matter." To this the statute adds a broad removal provision.

45. Section 1697 provides: "When the jurisdiction of the district court is based in whole or in part upon section 1369 of this title, process, other than subpoenas, may be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law."

46. Section 1785 provides:

When the jurisdiction of the district court is based in whole or in part upon section 1369 of this title, a subpoena for attendance at a hearing or trial may, if authorized by the court upon motion for good cause shown, and upon such terms and conditions as the court may impose, be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.

47. Service of process under § 1335(a) may be against "all claimants" and no geographical limit is provided. 28 U.S.C. § 2361 (2002).

48. § 1369(d).

49. Section 1369(d) reads, "even if that person [the intervenor] could not have brought an action in a district court as an original matter."

50. § 1369(a).

Section 1441(d) creates additional removal jurisdiction by bringing in cases that “could have been brought” under § 1369 and by nullifying the restrictions on removal in mass tort cases. Specifically, the in-state defendant, previously unable in ordinary diversity cases to remove,⁵¹ is specifically permitted to remove a mass disaster case to federal court.⁵² If the defendant “is a party to an action which is or could have been brought” under § 1369, it is removable.⁵³ If the action involves the “same accident as the action in State court” it is removable, even if the action “could not have been brought in district court as an original matter.”⁵⁴

Once the action is removed, it can either remain with that federal court, be transferred to another federal court under the Multidistrict Litigation Act,⁵⁵ or be dismissed for inconvenient forum.⁵⁶ For example, a state court action arising out of The Station nightclub disaster filed in California against the band Great White could be removed from state to federal court and transferred to federal court in Rhode Island, or it could be dismissed in California and re-filed in Rhode Island.

H. *The Act Provides for Liberal Venue Rules*

The Act amended § 1391 of the U.S. Code to provide that an action “based upon Section 1369” can be brought where “any defendant resides” or where “a substantial part of the accident giving rise to the action took place.”⁵⁷ Venue would be proper in Rhode Island, where the accident happened. However, the federal court retains the power “to transfer or dismiss an action on the ground of

51. § 1441(b).

52. The operative language is:

Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending (A) the action could have been brought in a United States district court under section 1369 of this title; or (B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

28 U.S.C. § 1441(e)(1) (2002).

53. § 1441(e)(1)(A).

54. § 1441(e)(1)(B).

55. 42 U.S.C. § 1407(j).

56. 28 U.S.C. § 1441(e)(2).

57. § 1391(g).

inconvenient forum.”⁵⁸ As stated earlier, this would mean that an action filed in California, Massachusetts—or Connecticut or any other place where a defendant could be found—could either be transferred to Rhode Island, or dismissed and re-filed in Rhode Island.

II. CAVEAT—THE FEDERAL COURT MAY ABSTAIN FROM ACCEPTING JURISDICTION

A. *The Act States the Federal Court Shall Abstain from Accepting Jurisdiction in Primarily Local Actions*

If a “substantial majority of all plaintiffs are citizens of” Rhode Island, if the “primary defendants are also citizens of” Rhode Island, and if the claims are governed primarily by Rhode Island law, then the federal court must abstain.⁵⁹ The Act states, under the language “Limitation of Jurisdiction,” that the court “shall abstain” from hearing an “action described in subsection [1369] (a)” if two conditions are met: “(1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and (2) the claims asserted will be governed primarily by the laws of that State.”⁶⁰ This is a critical provision of the Act. How does it apply to The Station fire?

The first condition has two parts: first, that a “substantial majority of the plaintiffs” be from “a single state.” The published lists of dead and injured are not complete, final, or official.⁶¹ The Act does not require that those who are deceased be “from a single state,” only that the “substantial majority of the plaintiffs” be citizens of a single state. It is possible, but by no means certain, that a court could conclude that Rhode Island victims predominate. The published list of known victims (there may be those who suffered slight injuries or property damage who are not listed in the papers⁶²) show scores of addresses from Massachusetts, many from

58. § 1441(e)(6).

59. § 1369(b)(1).

60. § 1369(b).

61. *The Station Nightclub Disaster—List of the Victims*, PROVIDENCE J.-BULL., Mar. 7, 2003, at A-12, 2003 WL 7058346.

62. The American Lung Association of Rhode Island has launched a public campaign to identify concert patrons who breathed toxic fumes, but who may not have sought medical treatment. According to Margaret Kane, Executive Director of the Association, “Some of these conditions don’t manifest themselves for weeks or months later That’s why it’s important to follow these people.” Tom Mooney, *Lung Association to Screen Fire Victims*, PROVIDENCE J.-BULL., Apr. 17, 2003.

Connecticut, and a few from other states. Rhode Island addresses appear to be in the bare majority.⁶³ Whether they are a “substantial majority” will require closer factual inquiry.

Second, the first condition requires that the “primary defendants” be from the same state as the substantial majority of plaintiffs. The only state to which that could apply is Rhode Island.

Must all of the primary defendants be from Rhode Island, or only some of them? The Act doesn’t say. It says “primary defendants.”⁶⁴ Are the primary defendants the owners of the nightclub, the Town of West Warwick, the building inspectors, the foam supplier, the local radio station, and the local beer distributor? Does it include the band Great White? Are the parties who created the condition under which the building could burn so rapidly primary defendants? Or is the party who lit the spark? Or are both?

The issue is more than how to classify certain defendants, but how to use the Act. True, an argument could be made that the primary defendants do not include insurance companies, Clear Channel Communications, Inc., the owner of the local radio station, or Anheuser-Busch, because their alleged liabilities are derived from their relationships to the primary defendants: the Town of West Warwick, the local beer distributor, and the local radio station. However, it would be difficult to argue that the California band Great White—whose fee for this performance was reported to be \$2,500⁶⁵—is not among the primary defendants. They started the fire. Consequently, it is difficult to argue that the primary defendants are all from Rhode Island.

Perhaps this is the wrong question. In making a determination of who is primary and thus who is secondary, the court should be guided by the ultimate question: which system, state or federal, can best produce a fair and expeditious result of all of the expected litigation, and how best should the Act be implemented? If the answer is federal, then there are arguably enough non-Rhode Island primary defendants here to justify a decision to keep the cases in federal court and not to abstain. Abstention, after all, requires looking not only at the victims, but also at the defendants. Even if a substantial majority of victims are from Rhode Island—a conclu-

63. According to the published list of victims, fifty-eight of the one hundred fatalities were Rhode Island residents. *The Station Nightclub Disaster—List of the Victims*, *supra* note 61.

64. 28 U.S.C. § 1369(b) (2002).

65. Wedge & Heslam, *supra* note 4.

sion that appears unlikely if the victim lists are accurate—not all the primary defendants appear to be from Rhode Island.

Turning to the second condition, whether the claims “will be governed primarily by the laws of”⁶⁶ Rhode Island, without knowing the legal theories of cases yet to be filed, it is difficult to predict whether the cases will be “governed primarily by” state law. However, two state lawsuits filed multiple causes of action under Rhode Island law only.⁶⁷ Should that pattern hold, then the second condition that the claims be “governed primarily” by state law would be met. But because the two conditions both must be met, if the “primary defendants” include the California band Great White, Anheuser-Busch, American Foam Company, or Clear Channel Communications, it is likely that the federal court would not abstain. A third lawsuit was filed under § 1360 in federal court on behalf of three Rhode Island plaintiffs.⁶⁸ This suit names several out-of-state plaintiffs and the State of Rhode Island, in addition to many of those plaintiffs named in the *Kingsley* and *Roderiques* state lawsuits.

B. *When Is the Decision to Abstain to Be Made?*

When does the federal court make the decision to abstain? The statute, as noted above, does not require for abstention a counting of victims, only a counting of “plaintiffs.” When is the count to be made? It is conceivable that additional cases may not be filed for a substantial period of time. Is the court supposed to anticipate that more cases will be filed in making a decision to abstain? Or must the court count only the existing plaintiffs? If it is the latter, then all of the existing plaintiffs in the two cases filed to date are from Rhode Island. That would create a skewed interpretation of the Act.

Congress did not provide a time limit for a court to decline jurisdiction. For the Act to work, the court must be given leeway to

66. § 1369(b).

67. *Kingsley v. Derderian*, No. 03-1171 (R.I. Super. Ct. Mar. 10, 2003), states claims against The Station’s owners, the installers of the soundproofing, the managers of the pyrotechnics, the members of the band Great White, a beer company, a radio station alleged to have sponsored the event, and the manufacturer of the foam. All the claims are based on Rhode Island law. *Roderiques v. Town of West Warwick*, No. PC 03-1084 (R.I. Super. Ct. Mar. 4, 2003), names fourteen defendants, many of which are named in *Kingsley*, and joins the Town of Warwick and the fire inspector. All of the claims arise under Rhode Island law. Neither action states federal claims for relief.

68. *Passa v. Derderian*, No. 03-148L (D.R.I. filed Apr. 22, 2003). This case is before Judge Ronald R. Lejeux.

wait for additional filings before making the determination. But if the court waits on the other plaintiffs to file, then the cases might sit in limbo in federal court while the court awaits word as to which of the other plaintiffs intend to file an action. Given the Hobson's Choice of prematurely declining jurisdiction on the one hand, and sitting on the filed or removed cases to see what will develop on the other, the better solution may be for the court to make an educated guess that those killed or injured will become plaintiffs, and the court would then count these potential plaintiffs along with those who have filed to determine who is a "plaintiff" for purposes of deciding whether to abstain.

However, that solution has pitfalls, too. The victim lists are unofficial, and include the dead and hospitalized, but not all those who were injured. And it omits property claims altogether. It is impossible from looking at the published lists to determine whether Rhode Island victims, who appear on first reading to be in the majority, would be a "substantial majority" as required by the Act. If the burden were to be placed on the parties seeking abstention, they may have a difficult burden. Perhaps that is the best a federal court could do if a case is removed—deny abstention on the grounds that the burden of proof rests with the party seeking abstention, and proceed to take control of the pace of litigation until such time as the residences of the victims become more clear. Or, alternatively, the federal court, if asked to do so, could take control of the litigation before it, finish all discovery, and then look at the abstention question. Then, if the rules require abstention, the federal court would remand to the Rhode Island courts.

The removal provisions may offer some solution to the abstention issue. The removal provisions of the Act⁶⁹ require a defendant to remove "within 30 days" after becoming a "party." However, the Act also allows removal "at a later time with leave of the district court." This could be interpreted (perhaps) as allowing the federal court to postpone the decision on whether to abstain from hearing the cases until a clearer picture emerges of whether a sub-

69. 42 U.S.C. §1441(e)(1) (2002) provides:

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

stantial majority of the plaintiffs and the primary defendants are from Rhode Island.

Ultimately, non-residents of Rhode Island have a right to litigate in federal court, if not under the Act then under general diversity jurisdiction. Non-residents of Rhode Island also have a right to remove to federal court, if not under the Act then under the removal statutes generally. A single Connecticut plaintiff can sue under diversity in Rhode Island federal court so long as no defendants in that action are from Connecticut. Obviously, the Act cannot be construed as denying to plaintiffs the right to sue under general diversity or denying to qualified defendants the right to remove under the general removal statutes. The power to abstain from hearing cases under § 1369 does not extend to a requirement that the federal court abstain from hearing cases filed under the general diversity or federal question provisions. Given that reality, it may be inevitable that The Station fire cases will end up in federal court. Even if the court were to abstain under § 1369, it cannot abstain under general diversity jurisdiction in § 1331.

III. THE BIG PICTURE: THE PRACTICAL IMPACT OF APPLICATION OF THE ACT

A. *The Act Exists to Simplify Litigation Which Otherwise May Be in Multiple Courts*

We cannot lose sight of the big picture. This Act exists to fulfill a need that the previous jurisdictional statutes could not fill. Just as the Federal Interpleader Act was created in response⁷⁰ to an state interpleader system that could not reach out-of-state claimants and thus forced an insurance company to pay the same debt twice,⁷¹ the Multidistrict, Multiforum Trial Jurisdiction Act was in response to the impossibility of trying complex cases in an expeditious manner before a single court. There are two ways the federal courts can assist the Rhode Island judicial system, should they be asked to do so.

First, the Federal Interpleader Act permits a federal court, should a defendant petition it, to enjoin disbursements and collection of judgments in any other court, even before the judgments are entered. Under *State Farm Fire & Casualty Co. v. Tashire*,⁷² the federal courts are permitted under the Federal Interpleader Act to su-

70. *Sanders v. Armour Fertilizer Works*, 292 U.S. 190, 194 (1934).

71. *N.Y. Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916).

72. 386 U.S. 523 (1967).

pervise the ultimate disbursements of funds which may be owed by tort defendants to plaintiffs before plaintiffs have reduced their claims to judgment. This prevents the first plaintiffs from settling or going to trial, and taking the lion's share of a defendant's assets, leaving little or nothing for the other victims.

Second, federal courts may consider dismissing without prejudice, rather than transferring to Rhode Island federal court,⁷³ cases filed in other states (should there be any). If actions are commenced in states other than Rhode Island, in state or federal court, the Multiforum, Multidistrict Trial Jurisdiction Act allows the federal court to "transfer" or dismiss for inconvenient forum.⁷⁴ Typically a court will accept the case and transfer to the convenient forum, which would undoubtedly be Rhode Island.⁷⁵ But there are important, critical consequences of whether the federal court in a non-Rhode Island state dismisses the action, causing the plaintiff to file a new action in Rhode Island (assuming the statute of limitations has not run) or if the federal court transfers the case to Rhode Island.

Here is the key concern. It is possible that, after assuming jurisdiction over a mass disaster case, and after having all the cases consolidated in a single court to determine liability, the federal court may be required by the Act to return the cases to state courts in which they were filed for trials on the issues of damages, unless convenience and justice requires otherwise.⁷⁶ The exception may swallow the rule—which state court? Here is the answer under the

73. 28 U.S.C. §§ 1404(a) & 1441(e)(6).

74. "Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum." § 1441(e)(6).

75. For example, in an action filed in New York federal court involving the negligent delivery of gasoline causing a warehouse fire in Virginia, the Court ruled that the action should not be tried in New York, but rather in Virginia, where the witnesses resided and the fire occurred. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 502-03, 512 (1946). The decision upheld the trial court's dismissal for *forum non conveniens*.

76. 28 U.S.C. § 1441(e)(2) provides:

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

The reference to "section 1407(j)" is a drafting error; the 1999 version of the Act contained a section 1407(j). See H.R. Rep. No. 106-276, at 2 (1999). The transfer language of Act went to another section, by cross reference to "Section 1407" in § 1441(e)(5), but the cross reference to "1407(j)" is to a nonexistent section, and it was not corrected.

Act: "The district court shall remand the action to the State court from which it had been removed for the determination of damages."⁷⁷ So, if actions are brought in Connecticut, Massachusetts, and California, and removed under § 1441 and transferred to Rhode Island federal court for trial, the federal court is directed by the Act to return the cases to the courts from which they were removed for purposes of trial on the issues of damages, again with proviso that the federal court can retain the cases for trial.

This result would disperse all the damage trials for cases not filed in Rhode Island among the sending courts. Instead of having Judge Alice Gibney in charge of all the damage cases, with the ability to bring about a global settlement, the cases would be spread, some in Rhode Island, some in Connecticut, others in Massachusetts, or California. Thus, more delay in reimbursing the victims for their damages would occur.

Consequently, federal courts not in Rhode Island may assist in the settlement or trial of these cases (assuming a finding of inconvenient forum) by dismissing without prejudice any action filed in any states other than the place of the tragedy, rather than by transferring the cases to Rhode Island. The dismissed cases would then be re-filed in Rhode Island. That simple difference would result in all damage claims being tried in Rhode Island courts, either state or federal, and might decrease delay and increase the chances of settlement.

B. If the Federal Court Were to Retain the Case, and Find Liability, the Act Creates a Presumption that the Cases Will Be Remanded to State Court for Finding of Damages

Under § 1441(e)(2), if the federal court retains the case, and makes "a liability determination requiring further proceedings as to damage" the court "shall remand" to the state, unless it finds that "for the convenience of parties and witnesses and in the interest of justice, the action should be retained for determination of damages." The standard is a broad one and leaves considerable room for judicial discretion. If all litigants in The Station fire cases stay out of federal court, the matter is moot. If litigants decide to use the federal court, and if the federal court does not decline jurisdiction, how the litigation will look after a determination of liability is hard to predict. What can be said at this stage is the language of

77. § 1441(e)(2).

§ 1441(e)(2) creates a presumption that the cases will be returned to state court. By severing liability from damages, however, the Act may alter the traditional function of judge and jury. Usually, defendants prefer trials on issues of liability only, and plaintiffs prefer both issues to be tried together. As a practical matter, the settlement value of a case depends upon both the strength of the evidence on liability and on damages. However, once liability is established, the cases may settle more quickly without having to use any evidence relating to damages.

C. The Federal Court's Decision on which Court Tries the Issues of Damages is Non-Appealable

Regardless of how the federal court rules on whether to remand to state court for trial on the issues of damages, the Act states the remand decision is not subject to appellate review. "Any decision," reads the Act, "under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise."⁷⁸ In effect, therefore, the federal trial judge will have the first, last, and only word on whether to try damages in federal court or remand the damages to state court. The reason should be apparent. If the federal court retains a case and tries it on issues of liability and then holds a second trial on damages, the parties have had their day in court. The same is true if the federal court returns the cases to the respective state courts.

D. The Act Allows an Immediate Appeal of a Finding of Liability Before Trial on the Issue of Damages

Under the Act, if a federal court finds no liability, judgment would be entered accordingly and be subject to appeal in the ordinary course. If a federal court finds liability, then the Act allows an immediate appeal before a trial on the issue of damages.⁷⁹ The Act allows only one appeal on the issue of liability.⁸⁰

By creating an appeal between the liability and damages por-

78. § 1441(e)(4) (2003).

79. Section 1441(e)(3) provides:

An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

80. 28 U.S.C. § 1441(e)(3).

tion of the case, the statute creates a potential for delay. Settling a case on appeal may be easier if there is a jury verdict on damages, because each side can estimate their risk of loss in real dollars. However, if a defendant loses on the liability question, an appeal would not be unexpected. The Act permits this appeal sooner rather than later, but not twice. Both judicial systems, state and federal, have a stake in handling these cases in an expeditious manner. As experienced lawyers know, most cases settle, and perhaps the best force for settlement is the trial judge's words, "Call your first witness." The Act has the potential to hasten that day, and thus hasten the settlement of many of the anticipated cases.

E. What if All Plaintiffs and All Defendants in an Action Wish to Remain in Rhode Island State Court?

There are two roads to federal court: 1) original jurisdiction under § 1369 (or § 1331) and 2) removal jurisdiction under § 1441. If, for example twenty-five plaintiffs sue in state court, and all the defendants in that case are satisfied with that forum, and take no steps to remove, the twenty-five cases remain in state court. There is nothing automatic about these rules; they are not self-executing. If both sides in an action arising out of The Station fire wish to remain in state court, they will. The Act allows plaintiffs to force unwilling defendants into federal court; the Act allows defendants to force unwilling plaintiffs into federal court. But if both sides to an action, plaintiffs and defendants choose state court, who can object? There appears to be no mechanism under the Act. Essentially, the Act does not give to federal courts exclusive jurisdiction over mass torts; it gives concurrent jurisdiction.

CONCLUSION

This article is highly tentative and meant to generate a thoughtful approach to the Act. The impulse for the article is to help the judicial process, in the face of this tragedy, to bring the cases to a just conclusion.

Without the Act, most cases would be in state court, while a few might be in federal court. There would be little uncertainty as to which court would hear the cases. Before the Act went into effect on February 2, 2003, in-state defendants in a mass tort could not remove, and Rhode Island plaintiffs could not sue Rhode Island defendants under the general diversity statute.

With the Act, once any plaintiff or any defendant invokes it,

then federal jurisdiction may well be inevitable. The likelihood that the Act applies is substantial, and even if a court were to abstain under the Act, which does not appear likely, the Act does not nullify the existing rights of plaintiffs, if they so choose, (assuming complete diversity) to litigate in federal court. Litigation in federal court without the Act increases the risk of increased cost and delay. Therefore, litigation with the Act is a preferable outcome. The choice may not be federal court under the Act versus state court. The choice may well be federal court under the Act versus federal court under general diversity statutes. However, if no party chooses to litigate in federal court, the cases will remain in state court.

The Rhode Island judiciary is preparing, as it must, for an onslaught of cases, without knowing in which court—state or federal—the cases may ultimately be heard. The Station fire cases will be litigated in a sea of uncertainty and sadness. Will defendants remove? Will plaintiffs choose federal court? Will plaintiffs sue outside of Rhode Island? Will the federal courts abstain? Are the Rhode Island victims a “substantial majority”? Are victims “plaintiffs” before they sue? Who are the “primary defendants”? Will a federal court try the issues of liability, and if so, damages as well?

The Act has great potential for expediting The Station fire cases. The object of the Act is to place all of the cases from a mass disaster before a single judge, who can supervise discovery, then try the issue of liability, and either try or remand the issue of damages. How this new procedural tool will function is uncertain. The Act consolidates the power in one court to either urge the parties to accept a global settlement, or send the unresolved cases to trial. There are many unanswered questions. It is up to judges and lawyers to make the statute work within the structures of the American system of litigation. Whether the trial judge will be a federal judge in Rhode Island or Judge Gibney or both remains to be seen. Let's hope the system will create some alternative procedures to bring these cases to a satisfactory solution.